

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 172
3131636

BETWEEN PETER RICHARD CLARKSON
Applicant

AND HUGH OSWALD CLARKSON
AND IAN NEIL CLARKSON
AND PETER RICHARD
CLARKSON AS TRUSTEES OF
THE GLENLYON TRUST
Respondent

Member of Authority: Trish MacKinnon

Representatives: Myriam Mitchell, counsel for the Applicant
Simon Mitchell, counsel for the Respondent

Investigation Meeting: On the papers

Submissions [and further 30 July and 27 August 2021 from the Applicant
Information] Received: 20 August 2021 from the Respondent

Date of Determination: 2 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Peter Clarkson was employed as Farm Manager by the Glenlyon Trust (the Trust) from 1985 until he was dismissed on notice on 17 December 2019, with his last day of employment being 10 March 2020. Before 1985 Mr Clarkson was employed by the RN Clarkson Trust to work on the farm from 1978 to 1985.

[2] Mr Clarkson is also one of the three trustees of the Trust, along with his brothers Hugh Oswald Clarkson and Ian Neil Clarkson. To avoid confusion, I will refer to the Applicant as

Mr Clarkson and to the other two trustees as either the trustees, or as Mr H Clarkson and Mr I Clarkson.

[3] On 15 November 2019 Mr Clarkson raised a personal grievance against the Trust for bullying and harassment. He raised a further personal grievance for unjustifiable dismissal on 18 December 2019.

[4] In proceedings commenced in the Authority on 29 January 2021, Mr Clarkson asked the Authority to resolve his personal grievances claims for unjustified disadvantage and unjustified dismissal. He also seeks resolution of his claims that the Trust breached its obligation of good faith to him and owes him outstanding holiday pay dating back to the commencement of his employment.

[5] The trustees deny Mr Clarkson's personal grievance and breach of good faith claims. They say that, if holiday pay is owed, Mr Clarkson has breached his duty as manager, and should be held liable for the sum.

Preliminary matter

[6] Mr Clarkson's substantive claims will be heard in due course. In the meantime an issue has arisen over documents he is seeking which the trustees claim are subject to privilege.

[7] The documents sought by Mr Clarkson, as articulated by the parties in a joint memorandum dated 10 June 2021, comprise:

- (a) All notes, minutes, emails, file notes and internal discussions regarding the termination of the Applicant's employment;
- (b) Correspondence from Hugh Clarkson in respect of employment matters;
- (c) Minutes of the Trust referring to the Applicant, including but not limited to notes of discussions between Messrs (H and I) Clarkson relating to the Applicant's employment or minutes of meetings of the Trust held in the Applicant's absence; and
- (d) Correspondence between the Respondent and Grow HR, including emails and advice received by Grow HR.

[8] I issued a Notice of Direction to the parties on 14 June 2021, requiring the trustees to file and serve on Mr Clarkson a list of documents as set out in [7] (a) – (d) above, stating the date, type of document, parties to the document, and the type of privilege claimed. Mr Clarkson was then to advise the trustees which documents he sought. Where the trustees claimed

privilege over documents, the parties were to make submissions on the matter and the Authority would determine whether or not privilege applied.

[9] The trustees subsequently provided a list of documents in an affidavit sworn by Mr H Clarkson. The list comprises two parts: the first part being the 91 documents the trustees do not consider to be privileged; and the second part, the 129 documents they do consider to be privileged. I will refer to these respectively as the Part 1 and Part 2 documents.

[10] Mr H Clarkson's affidavit stated the trustees' objection to producing the documents listed in Part 2 on the grounds that they are privileged in that:

- 1 "Documents consist of communications between the Respondents and Grow HR made after this proceeding was in contemplation and for the purpose of enabling Grow HR:
 - a. To advise the Respondents with regard thereto.
- 2 Documents consist of communications involving the parties, GHR and their Counsel Jacqui Grey made after this proceeding was in contemplation to provide advice."

[11] Mr Clarkson seeks, in addition to the Part 1 documents that have not yet been provided to him, 51 documents from Part 2 of the list. They comprise, in the main, although not exclusively, correspondence between one or both of the trustees and Mr Dave Robb/Grow HR, generated between 4 February 2019 and 17 December 2019.

[12] This determination deals with the issue of privilege. It has not been possible for the determination to be completed within the statutory timeframe specified in s 174D (2) of the Employment Relations Act 2000 (the Act), in circumstances the Chief of the Authority has decided, in accordance with s 174D(3) of the Act, are exceptional.

Submissions of the Parties

[13] Mr Clarkson contests the litigation privilege claimed by the trustees over the Part 2 documents. The nub of his submission, through counsel Myriam Mitchell, is that documents predating his dismissal on notice on 17 December 2019 were not documents made in contemplation of proceedings, or for the dominant purpose of enabling Grow HR to advise the Respondent with regard to apprehended proceedings.

[14] Ms Mitchell refers to s 56 of the Evidence Act 2006 (the EA), the relevant subsections of which provide as follows:

56 Privilege for preparatory materials for proceedings.

- (1) Subsection (2) applies to a communication or information only if the communication or information is made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding (the **proceeding**).
- (2) A person (the **party**) who is, or on reasonable grounds contemplates becoming, a party to the proceeding has a privilege in respect of—
 - (a) a communication between the party and any other person:
 - (b) a communication between the party's legal adviser and any other person:
 - (c) information compiled or prepared by the party or the party's legal adviser:
 - (d) information compiled or prepared at the request of the party, or the party's legal adviser, by any other person.
- (3) N/A

[15] Ms Mitchell submits a two-step assessment is required. Firstly, whether litigation was reasonably apprehended at the date the document or information was prepared and, secondly, whether the document was prepared for the dominant purpose of preparing for litigation.

[16] Applying that test to the Part 2 documents of the trustees' list, over which privilege is claimed, Ms Mitchell submits litigation could not reasonably have been apprehended before Mr Clarkson's dismissal on notice on 17 December 2019 and no privilege attaches to documents predating that event. Nor were the Part 2 documents prepared for the dominant purpose of preparing for litigation.

[17] In Ms Mitchell's submission the dominant purpose of communications between the trustees and Grow HR was to carry out investigations to assess employment concerns and ascertain how the trustees might respond to them. Until the outcome of those employment processes were reasonably known, the Part 2 documents could not be said to have been prepared for the dominant purpose of preparing for litigation. Nor were those documents made for the dominant purpose of enabling Grow HR to advise the trustees about such proceedings.

[18] Ms Mitchell concludes the trustees have claimed privilege on improper grounds and without foundation.

[19] The trustees submit, through counsel, Simon Mitchell, that they are not relying on s 56 of the EA in objecting to the disclosure of the Part 2 documents. Their objection is based on their claim to legal professional privilege under s 54 of the EA, which concerns privilege for communications with legal advisers. In particular the trustees refer to s 54 (1) which provides:

- (1) A person who requests or obtains professional legal services from a legal adviser has a privilege in respect of any communication between the person and the legal adviser if the communication was-
 - (a) intended to be confidential; and
 - (b) made in the course of and for the purpose of—
 - (i) the person requesting or obtaining professional legal services from the legal adviser; or
 - (ii) the legal adviser giving such services to the person.

[20] Mr Mitchell submits the Part 2 documents sought by Mr Clarkson are communications between the trustees and their legal adviser, Dave Robb of Grow HR. He says Mr Robb was providing legal advice to the trustees about how to address concerns that arose during Mr Clarkson's employment.

[21] Counsel for the trustees accepts that, for legal advice to be privileged under s 54 of the EA, it must be given by a lawyer, as is made clear in the Interpretation section of that part of the statute. Such advice given by a non-lawyer is not protected. He submits, however, that the privilege is broader in the employment jurisdiction, where a party is entitled to be represented by someone who is not a lawyer, than in general litigation.

[22] Mr Mitchell refers to clause 3, schedule 3 of the (Employment Relations) Act which specifically provides that, where a party to proceedings before the court is represented by a person other than a barrister or solicitor, any communications between that party and that person are as privileged as they would have been if the person had been a barrister or solicitor. In his submission, Mr Robb was the trustees' legal adviser and privilege accordingly attaches to his communications with them.

[23] In support of his arguments, Mr Mitchell quotes several passages from *Dormer v Hanger Company Ltd* where Judge Colgan, as he was at the time, considered whether general

legal professional privilege should extend to employment relations advisers who are not current practising barristers or solicitors.¹ The Judge concluded in the particular circumstances of that case that the traditional rationale for the privilege applied as much as it would if the adviser had held a current practising certificate.²

[24] In reply submissions for Mr Clarkson, Ms Mitchell observed that, in the list of documents sworn by Mr H Clarkson, the trustees were opposed to disclosure of the Part 2 documents on the basis that litigation privilege applied. Her submissions were accordingly focussed on responding to that claim to privilege. However, the trustees changed their claim in submissions to assert that the Part 2 documents were subject to a different category of privilege: legal professional privilege.

[25] In Ms Mitchell's submission, the trustees cannot now claim legal professional privilege, having failed to identify it as the type of privilege they considered relevant to the Part 2 documents in Mr H Clarkson's sworn list of documents. That failure had denied Mr Clarkson the opportunity to properly assess any challenge.

[26] In any event, in Ms Mitchell's submission, neither form of privilege is applicable to the Part 2 documents.

Discussion

[27] Both counsel have referred to the Evidence Act which is not binding in the employment jurisdiction but may provide useful guidance.³ The Privileged Communications provisions at clause 3, Schedule 3 of the Act, cited by counsel for the trustees, affect the Employment Court. The relevant, and similar, provisions that have effect in the Authority are found at clause 3, Schedule 2 of the Act.

[28] The provisions extend solicitor-client privilege in the employment jurisdiction to communications between a party to proceedings in the Authority and a representative of that party who is not a barrister or solicitor, i.e., a non-lawyer or a lay representative. Judge Colgan discussed the limits on that extension in *Dormer*, a judgment referred to by both counsel in the current case. He concluded that the intention of Parliament was that "the extension of solicitor-

¹ *Dormer v Hanger Company Ltd* [2003] 2 ERNZ 89.

² Above at [28].

³ *Maritime Union of NZ Inc v TLNZ Ltd* [2007] ERNZ 593 at [14].

client privilege was only to be to that non-lawyer representative in litigation and therefore was only intended to cover litigation privilege and not the broader advice privilege argued for by the defendant in this case”.⁴

[29] There were no proceedings afoot in this matter at the time the Part 2 documents were created. I accept Ms Mitchell’s submission that there could not have been any contemplation of proceedings in the Authority until after 17 December 2019, when Mr Clarkson was given notice of the termination of his employment. In the several months leading up to that date, it is clear from correspondence already disclosed that the trustees discussed with Mr Robb their concerns over aspects of Mr Clarkson’s management of the farm. They embarked on an investigation of those concerns and instigated a disciplinary process.

[30] The trustees may have had a notion that at some point these matters could result in proceedings in the Authority. However, that is too vague a possibility to justify reliance on “contemplated” or “reasonably apprehended” proceedings as a reason for the advice the trustees sought. I find there were no such proceedings in contemplation or pending at the time.

[31] In any event, as Mr Mitchell made clear in his submissions, despite Mr H Clarkson’s affidavit suggesting otherwise, the trustees are not relying on litigation privilege but on the privilege that attaches to communications with legal advisers. His submissions suggest the extension of legal professional privilege to “a person other than a barrister or solicitor” in clause 3 of Schedule 2 (and Schedule 3) of the Act entails a general legal professional privilege being applicable to all such persons.

[32] I do not accept that the extension of the privilege is as wide as counsel for the trustees submits and I refer again to *Dormer* and the Court’s finding of the limited nature of the extension of solicitor-client privilege, which applied to litigation privilege only and not to broader advice from a lay advocate.

[33] While, in that case, the Court found privilege attached to three of the four disputed documents⁵, that finding was made in “all the particular circumstances” of the case.⁶ Those

⁴ N1 at [14].

⁵ The fourth document was assessed as not relevant to the case.

⁶ N1 at [31].

circumstances included the representative being qualified and entitled to hold a current practising certificate as a barrister and/or solicitor but having chosen not to do so.

[34] In *Broughton v Microsoft New Zealand Ltd (No 2)*, Chief Judge Colgan, as he then was, found that privilege does not extend to material prepared for human resources advice, nor to advice based on that material. Nor could strategy documents prepared or varied after receipt of legal advice support a claim for privilege.⁷

[35] Grow HR, of which Mr Robb is a director, is a human resources consultancy. The trustees sought Mr Robb's advice in circumstances where they had concerns over the management of the Trust's farm by Mr Clarkson. Those concerns led to an investigation into certain matters, a disciplinary process, the issuing of a final written warning, and ultimately to Mr Clarkson's dismissal. Given those facts, it is reasonable to surmise that the type of advice Mr Robb provided the trustees in the period in which the Part 2 documents were generated was broad human resources/employment advice. That being so, it is not advice that attracts privilege.

[36] I note, however, that Mr Clarkson's statement of problem, and documents attached to it, refers to mediation the parties attended in October 2019 with the assistance of a mediator from the Ministry of Business, Innovation and Employment. The trustees' list of documents does not identify any of the Part 2 documents sought by Mr Clarkson as having been created or made for the purposes of that mediation, or as containing information that, for the purposes of the mediation, was disclosed orally in the course of the mediation.

[37] If there are any such documents in the trustees' list, they are required to be kept confidential in accordance with s 148 of the Act and may not be used as evidence in the Authority. One undated document in that list is likely to be in that category: the document is described as "Draft Settlement Agreement".

[38] I note a further four documents sought by Mr Clarkson from Part 2 of the trustees' list involved Ms Grey who, in correspondence included in Mr Clarkson's statement of problem, identified herself as Mr H Clarkson's lawyer. The documents in question are all emails and appear on page 7 of the trustees' list. Ms Grey was the author of one of the emails and she was either a recipient, or copied into, the other three. The documents are numbered 5, 6, 17, and

⁷ *Broughton v Microsoft NZ Ltd (No 2)* [2011] NZEmpC 102 at [7] and [8].

19 and are dated between September 2019 and 18 November 2019. It is possible legal professional privilege attaches to one or more of those emails but, in the absence of information as to their content, I am unable to determine that. I will return to this below.

Conclusion and next steps

[39] I have determined 46 of the 51 Part 2 documents sought by Mr Clarkson are not privileged. Of the remaining five, further information is required before it can be determined whether or not privilege attaches to them.

[40] Mr Clarkson asks the Authority to call for the documents under s 160(1)(a) of the Act and, if necessary, issue a witness summons to produce them. In the absence of powers to order discovery, that is a not infrequent course of action in the Authority. I hope it will not be necessary to convene a meeting with the parties specifically for this purpose and, in the first instance, I intend to convene a case management conference with them as soon as possible to discuss this and other issues arising from my determination.

[41] With regard to the documents in Part 1, over which there is no issue of privilege, Mr Clarkson, through counsel, states he has repeatedly requested, but not received them. If that remains the situation, the trustees, who have not raised any reason for withholding those documents from Mr Clarkson, should provide them to him immediately.

Costs

[42] Costs are reserved and will be considered following the determination of the substantive claims Mr Clarkson has brought to the Authority.

Trish MacKinnon
Member of the Employment Relations Authority